In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-584

ALAN DAVID SIANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. 1462 is unconstitutional under *Miller* v. *California,* No. 70-73, decided June 21, 1973, in that it fails to define with particularity the obscenity it proscribes; that this Court's construction of the terms "obscene," "lewd," etc., as used in the federal obscenity statutes, constituted an unconstitutional exercise of legislative power; that the trial court erred in not allowing alleged comparable materials into evidence; and that the trial court's instructions did not make clear whether a national or local community standard was to be employed by the jury.

Following a jury trial in the United States District Court for the Northern District of Illinois, prior to this Court's recent obscenity decisions, petitioner was convicted of knowingly causing obscene magazines and

decks of playing cards to be shipped interstate by common carrier, in violation of 18 U.S.C. 1462. He was sentenced to five years' imprisonment and a $5,000 fine. The court of appeals, after this Court's decision in *Miller*, affirmed by memorandum order (Pet. App. B).

The case arose out of the following facts: In the summer of 1968, petitioner approached James S. Harris, who operated a mail-order "girly" magazine business in Rockford, Illinois, and discussed supplying him with playing cards, films and magazines (Tr. 98-102). In November 1968, Harris agreed to purchase $600 worth of playing cards and magazines from petitioner, and he sent a check for that amount to petitioner at his home in Dayton, Ohio (Tr. 124-125; Gov. Exh. 1). On December 19, 1968, petitioner shipped from Dayton, Ohio to Harris in Rockford, Illinois, by Greyhound Lines two cartons containing 80 decks of playing cards and about 60 magazines with explicit pictures of males and females engaged in sexual intercourse in a variety of positions (Tr. 124-125; Gov. Exhs. 3-9). Thereafter, petitioner and Harris had other dealings in similar materials (Tr. 133, 136-138).

1. Petitioner contends that the court of appeals did not follow the standards set by this Court in *Miller* v. *California, supra,* and companion cases.[1] He argues that under *Miller* an appellate court must construe 18 U.S.C. 1462 to define the statutory standard before there can be a conviction under the statute. This argument, however, ignores this Court's

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[1] *Paris Adult Theatre I* v. *Slaton,* No. 71-1051; *United States* v. *Orito,* No. 70-69; *United States* v. *12 200-Ft. Reels of Super 8mm Film,* No. 70-2; *Kaplan* v. *California,* No. 71-1422.

decision in *United States* v. *12 200-Ft. Reels of Super 8mm Film,* No. 70-2, decided June 21, 1973, in which the Court specifically addressed the problem of defining such words as "obscene" and provided authoritative standards for interpretation of these words in federal statutes. Slip op. 7, no. 7. Since the lower federal courts are bound by that construction, their only task on review is to determine whether, under those standards, the materials involved were obscene.[2]

The court of appeals considered the materials under the *Miller—12 200-Ft. Reels* standard. The delay of the decision by the court below until after this Court's decisions and its subsequent ruling that "[t]he material, by any standard, is shockingly obscene," indicates that the court applied both the *Roth—Memoirs* and *Miller* guidelines.[3] The extent of

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[2]State courts, on the other hand, are required to review state obscenity laws for definiteness. As is apparent by the state cases cited by petitioner (Pet. 11-12), some state courts have found their state obscenity statutes inadequate, and they have reversed convictions on those grounds. These holdings have no effect on federal cases. With respect to dismissal of the indictment in *United States* v. *Lang,* No. 10712-HP-CP, C.D. Cal., July 18, 1973, the government is appealing that decision, which is the only federal case to have held that *Miller* prohibits prosecutions in pending cases arising out of acts committed prior to its rendition on June 21, 1973.

[3]*Roth* v. *United States,* 354 U.S. 476; *Memoirs* v. *Massachusetts,* 383 U.S. 413. Petitioner's suggestion that the material is not utterly without redeeming social value is unsupported. He does not suggest what social value the cards or magazines have, and it is clear they have none. "Fanny Hill," found to have social value in *Memoirs, supra,* is not comparable to these materials.

the review by the Seventh Circuit is similar to the treatment other circuits have given obscenity convictions reconsidered under *Miller*. See, *e.g.*, *United States* v. *Cote*, No. 72-2417 (C.A. 5, October 11, 1973) (*per curiam*); *Brown* v. *United States*, No. 71-1759 (C.A. 4, September 18, 1973) (order upon remand); *United States* v. *Carlson and Truax*, No. 73-1519 (C.A. 9, August 27, 1973); *United States* v. *Hamling*, 481 F. 2d 307 (C.A. 9) (denial of rehearing after reconsidering under *Miller*).

2. The contention that 18 U.S.C. 1462 is unconstitutional under *Miller* was answered in our memoranda in opposition in *Hamling, et al.* v. *United States*, No. 73-507 and in *Carlson and Truax* v. *United States*, No. 73-528 (both filed December 1973), upon which we rely here.[4] Contrary to petitioner's claim, *Miller* did not make federal obscenity laws turn on state law. Petitioner contends that because states may measure obscenity by state-wide standards rather than national standards, federal obscenity laws turn on state law. But applying contemporary state-wide community standards as opposed to national standards has nothing to do with state law. Either standard merely delineates the geographically determined group of people whose view the jury is to reflect. The jury does not look to state law to determine what people within the state would consider prurient or patently offensive; rather, it looks to its own experience or to expert testimony.

3. Petitioner further contends that this Court in *12 200-Ft. Reels of Film*, *supra*, improperly engaged in a

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[4]Copies of these memoranda are being sent to petitioner.

legislative function by defining the terms "obscene," "lewd," etc., used in federal obscenity statutes. Congress, however, determined that obscene materials may not be shipped in interstate commerce, and in *Roth* and *12 200-Ft. Reels* this Court merely defined the standards which must be used to identify those materials.[5]

4. Petitioner argues that the trial court erred in not allowing him to introduce into evidence comparable pornographic material allegedly available in the community. Such evidence would have been irrelevant since it would show only that other persons in the community may also have been selling obscene materials. Petitioner offered no expert testimony linking this proffered evidence to his defense. In these circumstances, the trial court correctly exercised its discretion in excluding the allegedly comparable materials from evidence. *United States* v. *Hamling, supra,* 481 F. 2d at 320; *United States* v. *Manarite,* 448 F. 2d 583, 593 (C.A. 2), certiorari denied, 404 U.S. 947; *Womack* v. *United STates,* 294 F. 2d 204, 206 (C.A.D.C.), certiorari denied, 365 U.S. 859.

5. Petitioner contends here, for the first time,[6] that under the trial court's instructions, it is not clear whether a national or local community standard was applied, and therefore, his conviction should be

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[5] *Miller, supra,* slip op. at 5. *United States* v. *12 200-Ft. Reels of Super 8mm Film, supra,* slip op. at 7, n. 7.

[6] On amended petition for rehearing below petitioner contended that a local standard should have been applied, but did not argue the instructions were defective for failing to state the standard.

vacated. While the trial court did not designate which community standard was to govern, petitioner did not object to the instruction or request that the instruction designate a particular standard. In any event, in view of the type of materials involved here, it cannot be supposed that if the standard had been specified, the finding of the jury that the materials were obscene would have been different. See *United States* v. *Miller*, 482 F. 2d 1379 (C.A. 9). Additionally, the court below made its own independent constitutional judgment, as required by *Jacobellis* v. *Ohio*, 378 U.S. 184, 188, that the materials, by any standard, are obscene.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

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